

(1932) 12 CAL CK 0025
In the Calcutta High Court

Shyam Sundar Debanshi

APPELLANT

Vs

Sm. Kamal Kumari Dassi and Others

RESPONDENT

Date of Decision : 08-12-1932

Acts Referred:

Citation : AIR 1933 Cal 769

Hon'ble Judges : S.K. Ghose, J;C.C. Ghose, J

Bench : Full Bench

Judgement

C.C. Ghose, J.—This is an appeal against the judgment and decree of the District Judge of Birbhum, dated 30th November 1931, refusing probate of the will of one Ramaprasanna Debanshi, dated 15th January 1930. The testator about the time of the execution of the will was about 36 or 37 years of age and he died on 19th March 1930, after having, it is alleged, executed the said will. So far as the signatures on the will itself are concerned, it is not disputed that those signatures were those of the testator. But what is suggested on behalf of the objectors is that those signatures had been put by the testator sometime previously on blank pieces of paper and that such papers had been left by him with Shyam Sundar Debanshi and that the latter in conspiracy with a number of other persons had written out on these blank papers a will purporting to be a will of the testator. In other words, the contention is that the body of the will is a forgery and that there is internal evidence to show that the will itself had not been duly executed by the testator. It is further contended that if one examines the contents of the will, the irresistible conclusion is that the will is of such an extraordinary character that very grave suspicion must attach to the will and that in the circumstances, a Court of probate will not admit the said will to probate unless and until the propounder satisfied the conscience of the Court that the will is a genuine one and that it was duly executed by the testator and that the circumstances alleged on behalf of the objectors, properly scrutinised and analysed, do not throw any suspicion whatsoever upon the question of the execution of the will by the testator.

2. Now, the learned Judge has gone into the matter at very great length. He has in his judgment discussed almost every point that was raised on behalf of the objectors and he finally came to the conclusion that the will was of such an extraordinary character, having regard to the state of the family of the testator to the fact that the will was alleged to have been executed by a young man of 36 or 37 and to the character of the dispositions themselves, that taking all circumstances into consideration, it was impossible to hold that the will had been executed by the testator.

3. The learned Judge after setting out the facts relating to the testator's family and the circumstances under which the will came to be executed as alleged goes on to examine the reasons given by the propounder why the testator thought it right to make a will. Those reasons, according to the learned Judge were insufficient and the learned Judge found that the main reason alleged on behalf of the propounder, namely that the testator was on terms of enmity with his tenants, that the testator had instituted as many as 200 suits against his tenants in the Settlement Court and that he was in danger of his life, was not a ground either substantial in itself or a ground for which there was even material in fact. The learned Judge then goes on to the question about the preparation of a draft and although he finds that according to the propounder no less than two drafts had been prepared, such drafts had not been produced and that in itself was a circumstance which cast doubt on the question of the execution of the will by the testator. He then proceeds to examine the evidence of the execution, and attestation of the execution by the various witnesses who had been called before the learned Judge.

4. In cases of this description although no doubt the onus probandi is on the person propounding the will, it is useful to remember that the proper way, to look at the question as to whether or not a will should be admitted to probate, is to proceed in the manner indicated by their Lordships of the Judicial Committee in the case of *Bulli Kunwar v. Bhagirathi* (1905) 9 CWN 649 (PC). Their Lordships observed that a Court of probate must consider first the question of the execution of the will. In a case where the trial Judge found that the will set up before him was a forgery primarily from a consideration of the contents of the will which he considered so extraordinary as to over-balance altogether the evidence of the witnesses who spoke to having been present and seen the testator sign the will and to having themselves signed the will as witnesses, their Lordships held that the trial Judge's method of procedure in discussing the question before him was an erroneous one namely, first to make up his mind about the contents of the will and then to look at the positive evidence in favour of its execution from that stand-point. (Per Lord Davey): see also in this connexion *Palchur Sankara Reddy v. Palchur Mahalakshamma* AIR 1922 PC 315.

5. What is meant by "due execution" will be found discussed at very considerable length in a case decided by this Court: *Woomesh Chunder Biswas v. Rashmohini Dassi* (1894) 21 Cal 279. It will therefore not be necessary for us to elaborate

the question of the "due execution" of the will. If the Court considers that the "due execution" has been proved, that in itself will amount to a finding that the testator with full knowledge of the claims of his relations upon his bounty, with full knowledge of the state of his properties and with full knowledge of every material circumstance, had executed the will. No doubt where the circumstances are such as cast suspicion upon the fact of the execution of the will, the Court, in examining the evidence bearing on that point, will of necessity exercise the utmost vigilance and will insist upon the propounder removing all grounds of suspicion that might exist. But it is not permissible to a Court of probate to consider aliunde the terms of the will, to consider whether the terms are generous or not, to consider whether the relations who had natural and legitimate claims on the testator's bounty, have been cut off altogether or not and then to consider the "due execution" of the will with preconceived ideas and to hold that the onus probandi had not been fully discharged by the propounder and to refuse to grant probate of the will.

6. As we had occasion to say the other day there is not much difficulty in ascertaining what the law is on the subject, and if there is as a matter of fact, no difficulty in ascertaining the law as laid down by eminent judicial authority from the dates of the very early cases reported in 2 Moore's Privy Council Cases down to the present time, then the question becomes really a question of pure fact, aye or no, whether the evidence of execution as spoken to by the attesting witnesses should or should not be given credence.

7. The first witness is the executor Syam Sunder Debansi. (After discussing his evidence, the judgment proceeded.) As regards Tincari it is said that he is a Naib of the Debansis and that therefore he cannot be expected to go against his employers, the Debansis. There may be some justification for an observation of this character but the evidence of Tincari does not stand by itself. The evidence of Tincari has got to be taken along with the evidence of the various other witnesses referred to above. As regards Madan Mohan De, the muktear, it is stated that he is a very junior muktear and that he is a young man of Syam Sundar's age. Of course the learned Judge had before him the witnesses, an opportunity which he had and which we have not. But we are entitled to examine for ourselves the reasons given by the learned Judge for discarding the evidence of these witnesses. Because a person is a very junior muktear and a young man, that is no reason by itself for discarding his evidence. (After discussing the evidence of other witnesses, the judgment proceeded.) There again the learned Judge has introduced reasons in his judgment which do not really bear on the question of the execution of the will but which really suggest that there were reasons for coming to the conclusion that the will was a suspicious one. No doubt as has been observed above where the circumstances are suspicious, the highest degree of vigilance and scrutiny should be exercised before the Court grants probate of a will. But it all depends upon the view-point you take. If you approach the question of the execution of the will by embarking on an elaborate inquiry as to whether or not the contents of the will were iniquitous or the

reverse and try to frame your final conclusions on the question of the execution of the will in the light of what you may consider about the nature of the contents of the will, then in the words of their Lordships of the Judicial Committee you embark upon an inquiry which is not permissible in a matter of this description.

8. It is not to be understood for one second that our reading of the cases in the Privy Council is this, that you must confine your attention exclusively to the due execution of the will and come to a conclusion one way or the other whether probate of the will should be granted or not, irrespective of the rest of the evidence on record. To start with, you have to consider the question of the execution of the will and direct your mind towards a close scrutiny of the evidence bearing on the question of the execution of the will. But at the same-time you are not to overlook or disregard such elements of suspicion as may be brought to your notice.

9. In other words, you are to analyse the direct or positive evidence as regards the execution of the will and try to test the accuracy of that evidence remembering all the time what are the real elements of suspicion which may attach to the execution of the will. Even at the risk of repeating what we have already said, it may be stated at once and finally that the process is not to be reversed and that you are not to embark upon an inquiry as to whether or not the will has been executed by discussing seriatim and at considerable length the terms of the will. From this point of view many of the criticisms urged as against the positive evidence bearing on the question of the execution do not bear scrutiny and examination and cannot be regarded as matters forming just grounds for refusing probate. We accept as correct the evidence of the execution of the will.

10. Now, as the learned Judge has discussed the nature of the terms of the will, it is just as well to make a brief reference to it. (After discussing the terms, His Lordship proceeded.) Now, to put it very shortly we do not think that the evidence of execution is unsatisfactory, we do not think that the evidence of execution is unreliable; on the contrary we are of opinion that all the available evidence that could be got has been produced by the propounder and he has finally discharged the onus that lay on him.

11. To sum up our conclusions, we are of opinion that the learned Judge started with a prejudice against the propounder, such prejudice having its origin in what he considered to be the iniquitous character of the will. He came to the conclusion that the will was an extraordinary one, he came to the conclusion that the testator had no reasons whatsoever for making the will, that he was a young man of 37 and that unless danger, palpable danger, had been shown to exist threatening his life there was no reason for him to execute the will. The learned Judge based his judgment really on these two points and then he proceeded to consider the question of the execution of the will. Now, if one is satisfied about the factum of execution, you are not entitled to pay exclusive attention to the terms of the will.

12. The testator apparently had to fight a large army of refractory and recalcitrant tenants. That is not denied by the witnesses, for what is suggested is that at the time of the execution of the will he had come to terms with a large body of his tenants, that he was in the habit of addressing his tenantry who belonged to the Moslem faith by endearing terms and that he did not entertain apprehensions about his life. Shamsundar has given a detailed and graphic account of what the testator's apprehensions were, and if once Shamsundar's story is accepted then you must come to the conclusion that the testator for reasons of his own may have thought it necessary to make this testamentary disposition of his properties lest on his death disputes and differences arise and render it possible for interested parties to squander away his properties including the patrimony that he had inherited. If once this conclusion is reached then all the elaborate reasons given by the learned Judge about there being no reason in existence for the making of the will would disappear.

13. We are further of opinion that the reasons given by the learned Judge for the finding that it was a forged will are insufficient and further that under no circumstances could Shyamapada Mukherji have been disbelieved. Nor was there any justification for coming to the conclusion that Baidyanath had come to Court to retail a story packed with untruths and supported by fanciful theories. There are no reasons for dismissing Syamsundar with the curt observation that because he was an interested party therefore no reliance should be placed on his testimony. If the theory of interestedness were to prevail the same standard must be applied to the defendant's witnesses and it cannot be denied that Kamal Kumari was as much interested in upsetting the will as Syamsundar was for supporting the will. We have already given sufficient reasons for coming to the conclusion that the terms of the will looked at fairly and squarely and from the point of view of the circumstances surrounding the testator and being not unmindful of what had gone on in the past with him are not extraordinary.

14. Kamal Kumari was deprived because she never pulled on well with her husband, she hardly lived with her husband, she came only thrice during the whole course of her married life and on each occasion she stayed only a few days and her subsequent conduct showed that she did not care much for her husband but she was interested only in securing a large slice of the husband's properties. Taking all these circumstances into consideration and being not unmindful of what has been observed by the learned Judge as a Judge of fact and of the circumstances that in questions relating to facts although regard must be had to the finding of a Court of first instance the appellant is entitled to invite us to come to our own independent conclusions thereon, we are unable to agree with the terms of the judgment and we have no other alternative but to direct that the judgment and decree of the Court below should be set aside and that this appeal be allowed with costs and that probate of the will should be granted. We assess the hearing-fee in this appeal at ten gold mohurs. In view of the terms of our judgment the order appointing the Nazir of the District Court as Administrator pendente lite to the estate of the deceased must cease to have

operation.

S.K. Ghose, J,

15. I agree.